



CENTER FOR
FOOD SAFETY

June 21, 2022

SUBMITTED VIA ONLINE SUBMISSION FORM

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460
(202) 566-1667

RE: Freedom of Information Act Request

To the U.S. Environmental Protection Agency (EPA) FOIA Officer:

The Center for Food Safety (CFS) is a 501(c)(3) national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS has a long history of promoting sustainable farming practices and advocating and litigating for the ban of chemical applications, such as neonicotinoid pesticides and herbicides. Consistent with CFS's mission and pursuant to 40 C.F.R. § 2.107(l)(2)(i) and the Freedom of Information Act, 5 U.S.C. § 552, CFS respectfully requests the following information:

Any and all communications between the United States Environmental Protection Agency (EPA) and federal partners mentioned on page ten of the March 2022 Difenconazole Interim Registration Decision regarding difenconazole's potential contribution to the development of triazole resistance in medical settings from January 11, 2016 to the present.

"Any and all documents" includes but is not limited to all communications, correspondence, minutes, memoranda, maps, plans, drawings, emails, reports, databases, notes, phone notes, and/or other documents received from or given to other agencies. This request includes all documents that have ever been within your custody or control, whether produced by you or by any others, including all current and former "working," investigative, retired, electronic mail, and/or other files.

This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

WASHINGTON D.C. OFFICE

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REQUEST FOR FEE-WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2)(i), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2)(i).

In determining whether the fee waiver criteria is satisfied, CFS respectfully reminds the EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Agency.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure the contents of the records to be disclosed have an informative value.
- (iv) Whether the contribution to public understanding is significant.

See 40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep’t of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.,* OMB Fee Guidelines, 52 Fed. Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest.

I. THE PRESENT DISCLOSURE IS IN THE PUBLIC INTEREST BECAUSE IT WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF GOVERNMENT.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The subject of the disclosure concerns “the operations and activities of the government.”

The requested information pertains to EPA’s communications with other government agencies regarding the potential connection between difenoconazole use and the development of triazole resistance in a medical setting. It is irrefutable that EPA’s communications with the CDC are a clearly identifiable operation of the government. *See* 40 C.F.R. § 2.107(l)(2)(i). The information sought by CFS reflects an interest in supporting this mission to ensure that the safety of difenoconazole and it is the utmost concern of the public. This disclosure will demonstrate to the public at large the nature of EPA’s decision-making process and its review of the adverse effects of difenoconazole in regard to its 2016 registrations.

B. The disclosure is “likely to contribute” to an understanding of government operations or activities.

As discussed in the previous section, the present disclosure will provide the public a better understanding of EPA’s regulatory decisions pertaining to the registration, use, and labeling of pesticides generally, and difenoconazole specifically. It will also provide the public with a better understanding of EPA’s communications with the CDC regarding triazole resistance. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *Id.* § 2.107(l)(2)(ii).

C. CFS is highly qualified to analyze the requested information, and is aptly positioned to disseminate it to the public.

CFS is a nonprofit, public interest organization with over one million farmer and consumer supporters nationwide that informs, educates, and counsels the public—via legal action, our website, our True Food Network, books and reports, and our quarterly newsletter, *Food Safety Now!*—on the harm done to human health and the environment by industrial agriculture. Through nearly two decades of involvement in technical analysis, environmental litigation, and policymaking as it relates to pesticide safety, CFS has gained unique expertise and an extensive background in issues with industrial agriculture, and specifically in issues surrounding pesticide use and its effect on human health and the environment. Regarding effects of pesticides on pollinators, CFS has litigated groundbreaking cases, repeatedly submitted comments and petitions to state and federal agencies, and published legal articles on federal oversight processes. Consequently, CFS is highly qualified to fully comprehend, analyze, and organize the requested records.

In addition, CFS is aptly positioned to disseminate the requested information because we have a long history of educating the public about the negative effects of pesticides used on the environment. For example, CFS has educated and informed consumers and its members about pesticides by, among other things, creating publicity campaigns; producing books, reports, and a newsletter; and maintaining a website that includes numerous articles about developments in attendant pesticide use, and its consequent human health, animal welfare, and environmental harms. Accordingly, CFS is an effective vehicle to disseminate information to the general public about use of difenoconazole and triazole resistance.

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the “reasonably broad audience” factor. *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. See *W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS’s activity in these respects far outstrips any minimums established by judicial interpretation.

D. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

The disclosure is likely to contribute significantly to public understanding of EPA’s regulatory decisions pertaining to the registration, use, and labeling, and negative effects of difenoconazole, as compared to the level of public understanding existing prior to the disclosure. 40 C.F.R. § 2.107(l)(2)(iv).

CFS employs science and policy experts who have analyzed FOIA, NEPA, FIFRA, and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.¹ More specifically, CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms to pollinators, human health, animal health, farmers, and the environment from the toxicity of difenoconazole. To that end, disclosure will result in an enhanced public understanding of EPA’s regulatory decisions pertaining to the use and labeling of pesticides. This disclosure is particularly relevant as the documents and communications regarding the registration of difenoconazole will potentially shed light on the agency’s decisions surrounding the regulation of difenoconazole.

II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO CENTER FOR FOOD SAFETY.

¹ See Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports>.

As previously noted, CFS is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our industrial food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on EPA's regulation of pesticides. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA as a result of this request.

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to mstevenson@centerforfoodsafety.org. Electronic materials are preferred but if records must be mailed, please send to 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111. Please call me at 574-309-5620 or email me at mstevenson@centerforfoodsafety.org if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,

/s/ Meredith Stevenson

Meredith Stevenson

Staff Attorney

Center for Food Safety

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